



Department of Justice

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DEPARTMENT OF JUSTICE COMMENTS ON “NETWORK NEUTRALITY” IN FEDERAL COMMUNICATIONS COMMISSION PROCEEDING

Antitrust Division Says Regulatory Proposals Could Limit Consumer Choice and Deter Network Investment

WASHINGTON — The Department of Justice cautioned against imposing regulations that could hamper the development of the Internet and related services in response to a Federal Communications Commission (FCC) Notice of Inquiry regarding broadband practices. In its filing the Department said that some regulatory proposals offered by various companies and organizations in the name of “net neutrality” could deter broadband Internet providers from upgrading and expanding their networks to reach more Americans.

The term “net neutrality” encompasses a variety of proposals that seek to regulate how broadband Internet providers transmit and deliver Internet traffic over their networks. The Department stated that precluding broadband providers from charging content and application providers directly for faster or more reliable service “could shift the entire burden of implementing costly network expansions and improvements onto consumers.” If the average consumer is unwilling or unable to pay more for broadband Internet access, the result could be to reduce or delay critical network expansion and improvement.

The Department said in its filing that it may make economic sense for content providers who want a higher quality of service to pay for the Internet upgrades necessary to provide such service, arguing that “any regulation that prohibits this type of pricing may leave broadband providers unable to raise the capital necessary to fund these investments.”

“Consumers and the economy are benefitting from the innovative and dynamic nature of the Internet,” said Thomas O. Barnett, Assistant Attorney General in charge of the Department’s Antitrust Division. “Regulators should be careful not to impose regulations that could limit consumer choice and investment in broadband facilities.”

The Department also noted that differentiating service levels and pricing is a common and often efficient way of allocating scarce resources and satisfying consumer demand. The U.S. Postal Service, for example, allows consumers to send packages with a variety of different delivery guarantees and speeds, from bulk mail to overnight delivery. These differentiated services respond to market demand and expand consumer choice.

“No one challenges the benefits to society of these differentiated products,” the

Department stated in its filing. “Whether or not the same type of differentiated products and services will develop on the Internet should be determined by market forces, not regulatory intervention.”

Despite the FCC’s call for specific information on harmful broadband activities, the Department noted that comments filed in response to this Notice of Inquiry did not provide evidence that would suggest the existence of a widespread problem that needs to be addressed. In addition, there is no consensus on what “net neutrality” means or what should be prohibited in the name of “neutrality.”

“Even assuming that a potential danger exists, the ambiguity of what conduct needs to be prohibited raises a real possibility that regulation would prohibit some conduct that is beneficial, while failing to stop other conduct that may be harmful,” the Department stated.

“The FCC should be highly skeptical of calls to substitute special economic regulation of the Internet for free and open competition enforced by the antitrust laws,” the Department said in its filing. “Marketplace restrictions proposed by some proponents of ‘net neutrality’ could in fact prevent, rather than promote, optimal investment and innovation in the Internet, with significant negative effects for the economy and consumers.”

While cautioning against premature regulation of the Internet, the Department noted its authority to enforce the antitrust laws. “Anticompetitive conduct about which the proponents of regulation are concerned will remain subject to the antitrust laws and enforcement actions by government as well as private plaintiffs, and the Department will continue to monitor developments, taking enforcement action where appropriate to ensure a competitive broadband Internet access market,” the Department stated.

A copy of the filing is available from the Department of Justice on the Antitrust Division’s web site: <http://www.usdoj.gov/atr>. Paper copies of the filing are also available from the Justice Department’s Antitrust Documents Group, which can be contacted by telephone at 202-514-2481, by fax at 202-514-3763, or by e-mail at atrdoc.grp@usdoj.gov.

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